

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

LADARREN PHARR,

Plaintiff,

Case No. 2:21-cv-156

v.

Honorable Jane M. Beckering

MICHAEL BROWN et al.,

Defendants.

OPINION

This is a civil rights action brought by a state prisoner under 42 U.S.C. § 1983. Plaintiff previously paid the full \$402.00 filing fee. Under the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (PLRA), the Court is required to dismiss any prisoner action brought under federal law if the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief. 28 U.S.C. § 1915A; 42 U.S.C. § 1997e(c). The Court must read Plaintiff's *pro se* complaint indulgently, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972), and accept Plaintiff's allegations as true, unless they are clearly irrational or wholly incredible. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). Applying these standards, the Court will dismiss Plaintiff's complaint for failure to state a claim.

Discussion

I. Factual Allegations

Plaintiff is presently incarcerated with the Michigan Department of Corrections (MDOC) at the Kinross Correctional Facility (KCF) in Kincheloe, Chippewa County, Michigan. The events

about which he complains occurred at that facility. Plaintiff sues Warden Michael Brown and Assistant Deputy Warden Bruce Bigger.

Plaintiff alleges that on November 18, 2020, Defendant Brown issued an email to the inmate population at KCF via JPay “admitting that he was entering into a plan, with other unnamed staff.” (ECF No. 1, PageID.3.) According to Plaintiff, Defendant Brown’s email stated as follows:

Good Afternoon,

We are receiving results from Monday’s testing of the entire population. We have not received enough results to allow us to finalize our plan to isolate the positives from the negatives. As soon as the numbers are received we will be finalizing and implementing our plan. I realize there are questions that you may have but please know that we will provide all of you with information as it becomes available.

In the meantime, ensure you are taking every precautionary measure you can to prevent contracting the [COVID-19] virus such as wearing masks, cleaning areas, washing hands.

Thank you,

Warden Brown

Kinross Correctional Facility

(*Id.*)

At approximately 2:00 a.m. on November 18, 2020, staff directed Plaintiff to pack his property because he was being moved to the KCF gym because of his negative COVID-19 result. (*Id.*) Plaintiff “was confined in the gym area with approximately 80 other prisoners, with only 1 hand washing station and 2 Port-a-Potties which were filled to capacity[] with contaminated waste from positive COVID-19 prisoners, who had previously occupied the gym area.” (*Id.*) Plaintiff was forced to relieve himself in the “contaminated Port-a-Potty” and had “no means to socially distance or clean the contaminated waste[] out of the Port-a-Potty.” (*Id.*) “While defecating the contaminated waste splashed” on him. (*Id.*) Plaintiff alleges he “was provided with no means to wash the contaminated waste off of his skin.” (*Id.*)

On November 19, 2020, Defendant Bigger came into the gym and was asked why inmates who had tested negative for COVID-19 had been placed into “[i]nhumane [l]iving [c]onditions, with no means to socially distance from the contaminated waste in the Port-a-Potty, clean the Port-a-Potty[,] or bath[e] after having their skin exposed to the waste from the Port-a-Potty.” (*Id.*, PageID.4.) Defendant Bigger responded, “It was part of the plan[;] Lansing told us to put you guys in the gym.” (*Id.*) On November 23, 2020, Plaintiff tested positive for COVID-19 and alleges that he was intentionally exposed to the virus. (*Id.*)

Based on the foregoing, Plaintiff alleges that Defendants engaged in a conspiracy to violate his rights under the Fourteenth Amendment. (*Id.*, PageID.4–5.) He also alleges that Defendants violated his Eighth and Fourteenth Amendment rights by intentionally and deliberately exposing him to the COVID-19 virus by placing him in an area previously occupied by inmates who had tested positive. (*Id.*) Plaintiff seeks declaratory and injunctive relief, as well as compensatory and punitive damages. (*Id.*)

II. Failure To State a Claim

A complaint may be dismissed for failure to state a claim if it fails “to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a complaint need not contain detailed factual allegations, a plaintiff’s allegations must include more than labels and conclusions. *Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”). The court must determine whether the complaint contains “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at

679. Although the plausibility standard is not equivalent to a “‘probability requirement,’ . . . it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678 (quoting *Twombly*, 550 U.S. at 556). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.” *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)); *see also Hill v. Lappin*, 630 F.3d 468, 470–71 (6th Cir. 2010) (holding that the *Twombly/Iqbal* plausibility standard applies to dismissals of prisoner cases on initial review under 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2)(B)(i)).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the federal Constitution or laws and must show that the deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996). Because § 1983 is a method for vindicating federal rights, not a source of substantive rights itself, the first step in an action under § 1983 is to identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

A. Civil Conspiracy Under § 1983

Plaintiff contends that Defendants conspired to “enter into an agreement to accomplish the overt act of placing [him] into an area previously occupied by [p]ositive COVID-19 prisoners” for the purpose of violating his constitutional rights. (ECF No. 1, PageID.4–5.)

A civil conspiracy under § 1983 is “an agreement between two or more persons to injure another by unlawful action.” *See Hensley v. Gassman*, 693 F.3d 681, 695 (6th Cir. 2012) (quoting *Hooks v. Hooks*, 771 F.2d 935, 943–44 (6th Cir. 1985)). The plaintiff must show the existence of a single plan, that the alleged coconspirator shared in the general conspiratorial objective to deprive the plaintiff of a federal right, and that an overt action committed in furtherance of the conspiracy

caused an injury to the plaintiff. *Hensley*, 693 F.3d at 695; *Bazzi v. City of Dearborn*, 658 F.3d 598, 602 (6th Cir. 2011). Moreover, a plaintiff must plead a conspiracy with particularity, as vague and conclusory allegations unsupported by material facts are insufficient. *Twombly*, 550 U.S. at 565 (recognizing that allegations of conspiracy must be supported by allegations of fact that support a “plausible suggestion of conspiracy,” not merely a “possible” one); *Fieger v. Cox*, 524 F.3d 770, 776 (6th Cir. 2008); *Spadafore v. Gardner*, 330 F.3d 849, 854 (6th Cir. 2003); *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir. 1987).

As evidence of a conspiracy, Plaintiff refers to the email sent to the KCF inmate population by Defendant Brown on November 18, 2020. (ECF No. 1, PageID.3.) He also references Defendant Bigger stating, “It was part of the plan[;] Lansing told us to put you guys in the gym.” (*Id.*, PageID.4.) These facts, however, fail to demonstrate that Defendants were part of a plan to conspire against him. Rather, Plaintiff’s allegations of conspiracy are conclusory and speculative. Plaintiff provides no allegations regarding any agreement between the alleged conspirators, beyond the fact that they all work at KCF for the MDOC. As the Supreme Court has held, such allegations, while hinting at a “possibility” of conspiracy, do not contain “enough factual matter (taken as true) to suggest that an agreement was made.” *Twombly*, 550 U.S. at 556. Instead, the Court has recognized that although parallel conduct may be consistent with an unlawful agreement, it is insufficient to state a claim where that conduct “was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed . . . behavior.” *Iqbal*, 556 U.S. at 680 (citing *Twombly*, 550 U.S. at 567). Accordingly, because Plaintiff does not allege an agreement among

Defendants to violate his constitutional rights, Plaintiff fails to state a plausible claim of conspiracy.¹

B. Eighth Amendment Claims

Plaintiff also alleges that Defendants violated his Eighth Amendment rights by intentionally and deliberately exposing him to the COVID-19 virus by placing him into an area that had previously been occupied by prisoners who had tested positive for COVID-19. (ECF No. 1, PageID.5.)

1. Standard

The Eighth Amendment imposes a constitutional limitation on the power of the states to punish those convicted of crimes. Punishment may not be “barbarous” nor may it contravene society’s “evolving standards of decency.” *Rhodes v. Chapman*, 452 U.S. 337, 345–46 (1981). The Amendment, therefore, prohibits conduct by prison officials that involves the “unnecessary and wanton infliction of pain.” *Ivey v. Wilson*, 832 F.2d 950, 954 (6th Cir. 1987) (per curiam) (quoting *Rhodes*, 452 U.S. at 346). The deprivation alleged must result in the denial of the “minimal civilized measure of life’s necessities.” *Rhodes*, 452 U.S. at 347; *see also Wilson v. Yaklich*, 148 F.3d 596, 600–01 (6th Cir. 1998). The Eighth Amendment is only concerned with “deprivations of essential food, medical care, or sanitation” or “other conditions intolerable for prison confinement.” *Rhodes*, 452 U.S. at 348 (citation omitted). Moreover, “[n]ot every unpleasant experience a prisoner might endure while incarcerated constitutes cruel and unusual punishment within the meaning of the Eighth Amendment.” *Ivey*, 832 F.2d at 954.

¹ Moreover, a plaintiff “cannot succeed on a conspiracy claim [when] there was no underlying constitutional violation that injured [the plaintiff].” *Wiley v. Oberlin Police Dep’t*, 330 F. App’x 524, 530 (6th Cir. 2009) (citing *Bauss v. Plymouth Twp.*, 233 F. App’x 490, 500 (6th Cir. 2007)). As set forth herein, Plaintiff fails to state Eighth and Fourteenth Amendment claims against Defendants, and as such, Plaintiff cannot maintain a plausible conspiracy claim. *See infra* Part II, B–C.

For a prisoner to prevail on an Eighth Amendment claim, he must show that he faced a sufficiently serious risk to his health or safety and that the defendant official acted with “‘deliberate indifference’ to [his] health or safety.” *Mingus v. Butler*, 591 F.3d 474, 479–80 (6th Cir. 2010) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (applying deliberate indifference standard to medical claims)); *see also Helling v. McKinney*, 509 U.S. 25, 35 (1993) (applying deliberate indifference standard to conditions of confinement claims)). The deliberate-indifference standard includes both objective and subjective components. *Farmer*, 511 U.S. at 834; *Helling*, 509 U.S. at 35–37. To satisfy the objective prong, an inmate must show “that he is incarcerated under conditions posing a substantial risk of serious harm.” *Farmer*, 511 U.S. at 834. Under the subjective prong, an official must “know[] of and disregard[] an excessive risk to inmate health or safety.” *Id.* at 837. “[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted.” *Id.* at 844.

2. Analysis

a. Objective Prong

In a 2020 case brought by federal prisoners under 28 U.S.C. § 2241, the Sixth Circuit addressed the issue of whether the Bureau of Prisons (BOP) violated the Eighth Amendment rights of medically vulnerable inmates at the Elkton Federal Correctional Institution by failing to adequately protect them from COVID-19 infection. *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020). In the opinion, the Sixth Circuit found that the plaintiffs in *Wilson* had easily satisfied the objective component of an Eighth Amendment claim:

The COVID-19 virus creates a substantial risk of serious harm leading to pneumonia, respiratory failure, or death. The BOP acknowledges that “[t]he health risks posed by COVID-19 are significant.” CA6 R. 35, Appellant Br., PageID 42. The infection and fatality rates at Elkton have borne out the serious risk of COVID-19, despite the BOP’s efforts. The transmissibility of the COVID-19 virus in

conjunction with Elkton’s dormitory-style housing—which places inmates within feet of each other—and the medically-vulnerable subclass’s health risks, presents a substantial risk that petitioners at Elkton will be infected with COVID-19 and have serious health effects as a result, including, and up to, death. Petitioners have put forth sufficient evidence that they are “incarcerated under conditions posing a substantial risk of serious harm.” *Farmer*, 511 U.S. at 834.

Id. at 840.

The Sixth Circuit has determined that a plaintiff may satisfy the objective prong by alleging conditions that could facilitate COVID-19 transmission within a prison and the health risks posed by the virus, certainly at least with respect to medically vulnerable inmates per *Wilson*, and possibly with respect to inmates who are not otherwise medically vulnerable. Plaintiff does not allege that he is medically vulnerable; however, he does allege conditions that could facilitate COVID-19 transmission within the prison, *i.e.*, placement in a gym that had previously held inmates who tested positive and exposure to those inmates’ contaminated waste. The Court, therefore, concludes that at this stage of the proceedings Plaintiff alleges facts sufficient to satisfy the objective prong of the deliberate indifference test.

b. Subjective Prong

Notwithstanding Plaintiff’s ability to satisfy the objective prong, he fails to allege facts sufficient to satisfy the subjective prong of the deliberate indifference test. Here, Plaintiff avers that Defendants deliberately exposed him to the COVID-19 virus by placing him in the KCF gym, where inmates who had previously tested positive for the virus had been housed. Plaintiff avers that he was exposed to contaminated waste from the Port-a-Potty and that Defendants’ actions led him to ultimately contract COVID-19.

The Sixth Circuit went on in *Wilson* to address the subjective prong of an Eighth Amendment claim, noting that the pertinent question was whether the BOP’s actions demonstrated deliberate indifference to the serious risk of harm posed by COVID-19 in the prison.

There is no question that the BOP was aware of and understood the potential risk of serious harm to inmates at Elkton through exposure to the COVID-19 virus. As of April 22, fifty-nine inmates and forty-six staff members tested positive for COVID-19, and six inmates had died. “We may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious.” *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). The BOP acknowledged the risk from COVID-19 and implemented a six-phase plan to mitigate the risk of COVID-19 spreading at Elkton.

The key inquiry is whether the BOP “responded reasonably to th[is] risk.” *Farmer*, 511 U.S. at 844. The BOP contends that it has acted “assiduously to protect inmates from the risks of COVID-19, to the extent possible.” CA6 R. 35, Appellant Br., PageID 42. These actions include

implement[ing] measures to screen inmates for the virus; isolat[ing] and quarantin[ing] inmates who may have contracted the virus; limit[ing] inmates’ movement from their residential areas and otherwise limit[ing] group gatherings; conduct[ing] testing in accordance with CDC guidance; limit[ing] staff and visitors and subject[ing] them to enhanced screening; clean[ing] common areas and giv[ing] inmates disinfectant to clean their cells; provid[ing] inmates continuous access to sinks, water, and soap; educat[ing] staff and inmates about ways to avoid contracting and transmitting the virus; and provid[ing] masks to inmates and various other personal protective equipment to staff.

Id. at 42–43.

The BOP argues that these actions show it has responded reasonably to the risk posed by COVID-19 and that the conditions at Elkton cannot be found to violate the Eighth Amendment. We agree.

Here, while the harm imposed by COVID-19 on inmates at Elkton “ultimately [is] not averted,” the BOP has “responded reasonably to the risk” and therefore has not been deliberately indifferent to the inmates’ Eighth Amendment rights. *Farmer*, 511 U.S. at 844. The BOP implemented a six-phase action plan to reduce the risk of COVID-19 spread at Elkton. Before the district court granted the preliminary injunction at issue, the BOP took preventative measures, including screening for symptoms, educating staff and inmates about COVID-19, cancelling visitation, quarantining new inmates, implementing regular cleaning, providing disinfectant supplies, and providing masks. The BOP initially struggled to scale up its testing capacity just before the district court issued the preliminary injunction, but even there the BOP represented that it was on the cusp of expanding testing. The BOP’s efforts to expand testing demonstrate the opposite of a disregard of a serious health risk.

Id. at 840–41.

In its decision, the Sixth Circuit recognized that other Sixth Circuit decisions have found similar responses by prison officials and medical personnel, such as cleaning cells, quarantining infected inmates, and distributing information about a disease in an effort to prevent spread, to be reasonable. *Id.* at 841 (citing *Wooler v. Hickman Cnty.*, 377 F. App'x 502, 506 (6th Cir. 2010); *Rouster v. Cnty. of Saginaw*, 749 F.3d 437, 448–49 (6th Cir. 2014); *Harrison v. Ash*, 539 F.3d 510, 519–20 (6th Cir. 2008); *Rhinehart v. Scutt*, 894 F.3d 721, 740 (6th Cir. 2018)). The *Wilson* Court also noted that other circuits had concluded that similar actions by prison officials demonstrated a reasonable response to the risk posed by COVID-19:

In *Swain [v. Junior]*, the Eleventh Circuit granted a stay of a preliminary injunction pending appeal on state inmates' Eighth Amendment claims. 958 F.3d [1081,] 1085 [(11th Cir. 2020) (per curiam)]. The Eleventh Circuit held that “the inability to take a positive action likely does not constitute ‘a state of mind more blameworthy than negligence,’” and “the evidence supports that [Metro West Detention Center (“MWDC”) is] taking the risk of COVID-19 seriously.” *Id.* at 1088–90 (citation omitted). In response to the pandemic in early March, MWDC began “cancelling inmate visitation; screening arrestees, inmates, and staff; and advising staff of use of protective equipment and sanitation practices” and, after reviewing further CDC guidance, began “daily temperature screenings of all persons entering Metro West, establish[ed] a ‘COVID-19 Incident Command Center and Response Line’ to track testing and identify close contacts with the virus, develop[ed] a social hygiene campaign, and mandate[d] that staff and inmates wear protective masks at all times.” *Id.* at 1085–86. The Eleventh Circuit held that, because MWDC “adopted extensive safety measures such as increasing screening, providing protective equipment, adopting [physical] distancing when possible, quarantining symptomatic inmates, and enhancing cleaning procedures,” MWDC’s actions likely did not amount to deliberate indifference. *Id.* at 1090.

Similarly, the Fifth Circuit granted stays of two preliminary injunctions in *Valentine [v. Collier]*, 956 F.3d 797 (5th Cir. 2020) (per curiam),] and *Marlowe [v. LeBlanc]*, No. 20-30276, 2020 WL 2043425 (5th Cir. Apr. 27, 2020) (per curiam)]. In *Valentine*, inmates at Texas’s Wallace Pack Unit filed a class action suit against the Texas Department of Criminal Justice (“TDCJ”) alleging violations of the Eighth Amendment. 956 F.3d at 799. In response to the COVID-19 pandemic, TDCJ had taken preventative measures such as providing “access to soap, tissues, gloves, [and] masks,” implementing “regular cleaning,” “quarantin[ing] of new prisoners,” and ensuring “[physical] distancing during transport.” *Id.* at 802. The Fifth Circuit determined that the district court applied the wrong legal standard by “collaps[ing] the objective and subjective components of the Eighth Amendment inquiry” by “treating inadequate measures as dispositive of the Defendants’ mental

state” under the subjective prong and held that “accounting for the protective measures TDCJ has taken” the plaintiffs had not shown deliberate indifference. *Id.* at 802–03. In *Marlowe*, the Fifth Circuit relied on its reasoning in *Valentine* and again reiterated that there was “little basis for concluding that [the correctional center’s] mitigation efforts,” which included “providing prisoners with disinfectant spray and two cloth masks[,] . . . limiting the number of prisoners in the infirmary lobby[,] and painting markers on walkways to promote [physical] distancing,” were insufficient. 2020 WL 2043425, at *2–3.

Wilson, 961 F.3d at 841–42.

After reviewing the cases, the *Wilson* Court held that even if the BOP’s response to COVID-19 was inadequate, it took many affirmative actions, not only to treat and quarantine inmates who had tested positive, but also to prevent widespread transmission of COVID-19. The Court held that because the BOP had neither disregarded a known risk nor failed to take steps to address the risk, it did not act with deliberate indifference in violation of the Eighth Amendment. *Id.* at 843–44.

In addition, in *Cameron v. Bouchard*, 818 F. App’x 393 (6th Cir. 2020), the Court relied on *Wilson* to find that pretrial detainees in the Oakland County Jail were unlikely to succeed on the merits of their Eighth and Fourteenth Amendment claims. The plaintiffs in *Cameron* claimed that jail officials were deliberately indifferent to the substantial risk of harm posed by COVID-19 at the jail. The district court initially granted a preliminary injunction requiring the defendants to “(1) provide all [j]ail inmates with access to certain protective measures and medical care intended to limit exposure, limit transmission, and/or treat COVID-19, and (2) provide the district court and Plaintiffs’ counsel with a list of medically vulnerable inmates within three business days.” *Id.* at 394. However, following the decision in *Wilson*, the Court granted the defendants’ renewed emergency motion to stay the preliminary injunction, finding that the preventative measures taken by the defendants were similar to those taken by officials in *Wilson* and, thus, were a reasonable response to the threat posed by COVID-19 to the plaintiffs. *Id.* at 395. Subsequently, in an

unpublished opinion issued on July 9, 2020, the Sixth Circuit vacated the injunction. *Cameron v. Bouchard*, 815 F. App'x 978 (6th Cir. 2020).

The Court notes that the MDOC issued a COVID-19 Director's Office Memorandum (DOM) on April 8, 2020, and issued multiple revised DOMs on the subject to limit the threat posed by COVID-19.² See MDOC DOM 2020-30 (eff. Apr. 8, 2020) (mandating multiple protective measures including the wearing of masks by prisoners and staff, screening of all individuals before entering prison facilities, keeping of social distance, restricting visits and phone calls, and limiting transfers and cell moves); DOM 2020-30R2 (eff. May 26, 2020) (outlining specific precautions to be taken by staff members, including the use of personal protective equipment and hand sanitizer); DOM 2020-30R3 (eff. May 27, 2020); DOM 2020-30R4 (eff. Aug. 10, 2020); DOM 2020-30R5 (eff. Aug. 25, 2020); DOM 2020-30R6 (eff. Aug. 27, 2020); DOM 2020-30R7 (eff. Nov. 5, 2020); DOM 2020-30R8 (eff. Nov. 24, 2020); DOM 2021-26 (eff. Jan. 1, 2021); DOM 2021-26R (eff. Jan. 12, 2021); DOM 2021-26R (eff. Jan. 12, 2021); DOM 2021-26R2 (eff. Jan. 21, 2021); DOM 2021-26R3 (eff. Jan. 25, 2021); DOM 2021-26R4 (eff. Mar. 5, 2021); DOM 2021-26R5 (eff. Mar. 19, 2021); DOM 2021-26R6 (eff. Mar. 26, 2021); DOM 2021-26R7 (eff. June 23, 2021); DOM 2021-26R7 (eff. June 23, 2021); DOM 2021-26R8 (eff. Aug. 6, 2021); DOM 2021-26R9 (eff. Aug.

² The Court takes judicial notice of these facts under Rule 201 of the Federal Rules of Evidence. The accuracy of the source regarding this specific information "cannot reasonably be questioned." Fed. R. Evid. 201(b)(2); see also Paul F. Rothstein, *Federal Rules of Evidence* 49 (3d ed. 2019) (citing *Matthews v. NFL Mgmt. Council*, 688 F.3d 1107 (9th Cir. 2012) (taking judicial notice of statistics on the NFL website that the plaintiff played 13 games in California over 19 years); *Victaulic Co. v. Tieman*, 499 F.3d 227, 236–37 (3d Cir. 2007), as amended (Nov. 20, 2007) (finding error where a district court took judicial notice of facts stated in "a party's . . . marketing material" on an "unauthenticated" website because marketing materials often lack precise and candid information and the source was not authenticated)). Moreover, "[t]he court may take judicial notice at *any* stage of the proceeding." Fed. R. Evid. 201(d) (emphasis added). Thus, the Court may take judicial notice even at this early juncture because the Court is permitted to take judicial notice *sua sponte*, Fed. R. Evid. 201(c)(1), and "the fact is not subject to reasonable dispute," Fed. R. Evid. 201(b).

23, 2021); DOM 2021-26R10 (eff. Oct. 11, 2021); DOM 2021-26R11 (eff. Nov. 19, 2021); DOM 2021-26R12 (eff. Dec. 3, 2021); DOM 2022-21R (eff. Jan. 11, 2022); DOM 2022-21R2 (eff. Jan. 14, 2022); DOM 2022-21R3 (eff. Jan. 18, 2022); DOM 2022-21R4 (eff. Jan. 24, 2022); DOM 2022-21R5 (eff. Feb. 9, 2022); DOM 2022-21R6 (eff. Feb. 15, 2022); DOM 2022-21R7 (eff. Feb. 28, 2022). The DOMs set forth specific details about protective measures to be taken in all facilities: describing the types of PPE to be worn by staff and when; setting screening criteria for individuals entering facilities; setting social distancing requirements; establishing isolation areas and practices for isolation; setting practices for managing prisoners under investigation for COVID-19; modifying how personal property is managed; setting requirements for jail transfers; outlining communication adjustments and video visitation; upgrading hygiene, health care, and food service policies; setting protocols for COVID-19 testing of prisoners; and making other necessary adjustments to practices to manage the pandemic. Thus, the MDOC responded to the COVID-19 threat by adopting new policies and adjusting practices. Plaintiff does not allege that Defendants failed to take the actions outlined in the DOMs.

Clearly, the MDOC, including Defendants, has taken extensive steps to address the risk of COVID-19 to inmates statewide and at KCF. Plaintiff does not allege that Defendants deliberately contravened these MDOC policies. Instead, Plaintiff's allegations suggest that Defendants took affirmative steps to comply with MDOC policies aimed at protecting prisoners. (ECF No. 1, PageID.3) (referencing Defendant Brown's email about how staff at KCF were finalizing a plan to "isolate the positives from the negatives"). As noted by the Sixth Circuit in *Wilson*, such actions demonstrate the opposite of a disregard of a serious health risk. *Wilson*, 961 F.3d at 841.

Moreover, Plaintiff fails to demonstrate that Defendants knew of an excessive risk to his health or safety, much less that they disregarded such a risk, by moving him and other inmates

who had tested negative for COVID-19 into the gym that had previously been occupied by inmates who had tested positive. *See Farmer*, 511 U.S. at 837. Plaintiff provides no context about the timeline of when inmates who had tested positive were housed in the gym at KCF. Moreover, to the extent that Plaintiff asserts he contracted COVID-19 from exposure to overflowing waste in the Port-a-Potty, Plaintiff fails to allege facts that Defendants were personally aware that the Port-a-Potty was overflowing.³ In any event, Plaintiff's exposure to the overflowing Port-a-Potty, while no doubt unpleasant, does not amount to an Eighth Amendment violation. *See Smith v. Copeland*, 87 F.3d 265, 269 (8th Cir. 1996) (no Eighth Amendment violation where the inmate was exposed to raw sewage from an overflowing toilet in his cell for four days). At best, Plaintiff has alleged facts suggesting only the mere possibility that Defendants violated the Eighth Amendment. His allegations therefore fail to state a claim. *See Iqbal*, 556 U.S. at 678.

Although the Court is sympathetic to Plaintiff's general concern about the COVID-19 virus, his claims are entirely built upon speculation. The MDOC and Defendants have promulgated and implemented numerous policies to address the risk posed to inmates by COVID-19, and Plaintiff's allegations suggest that Defendants expected their subordinates to enforce those policies. Plaintiff has failed to allege facts demonstrating that any Defendant was deliberately indifferent to his health and safety. At most, with the benefit of hindsight, Defendants may have

³ Plaintiff appears to suggest that he contracted the virus when contaminated waste got onto his skin. The Centers for Disease Control and Prevention (CDC), however, has suggested that "[t]he virus that causes COVID-19 has been found in the feces of some patients diagnosed with COVID-19. However, it is unclear whether the virus found in feces may be capable of causing COVID-19. There has not been any confirmed report of the virus spreading from feces to a person." *See* <https://www.cdc.gov/coronavirus/2019-ncov/php/water.html> (last visited Feb. 24, 2022). Notwithstanding the Court's ability to take judicial notice under Rule 201 of the Federal Rules of Evidence, the information regarding the transmissibility of the virus from feces plays no role in the Court's decision. Instead, this information merely provides context and additional information to a prisoner who is incarcerated amidst an ongoing pandemic. *C.f. United States v. Mathews*, 846 F. App'x 362, 364 n.3 (6th Cir. 2021).

been negligent when they moved prisoners who had tested negative into an area that had been occupied by inmates who had tested positive and did not address the overflowing Port-a-Potty before doing so. Allegations of negligence, however, fall short of the deliberate indifference required to state an Eighth Amendment claim. *See Farmer*, 511 U.S. at 835 (holding that an Eighth Amendment violation requires a “state of mind more blameworthy than negligence”). The Court, therefore, will dismiss Plaintiff’s Eighth Amendment claims against Defendants.

C. Fourteenth Amendment Claims

Plaintiff claims further that Defendants’ conduct violated his rights under the Fourteenth Amendment. (ECF No. 1, PageID.5.) Presumably, Plaintiff intends to raise a substantive due process claim.⁴

The Due Process Clause of the Fourteenth Amendment prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law[.]” U.S. Const. amend. XIV. “Substantive due process ‘prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty.’” *Prater v. City of Burnside*, 289 F.3d 417, 431 (6th Cir. 2002) (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)). “Substantive due process . . . serves the goal of preventing governmental power from being used for purposes of oppression, regardless of the fairness of the procedures used.” *Pittman v. Cuyahoga Cnty. Dep’t of Child. & Fam. Servs.*, 640 F.3d 716, 728 (6th Cir. 2011) (quoting *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir. 1996)). “Conduct shocks the conscience if it ‘violates the “decencies of civilized conduct.”” *Range v. Douglas*, 763 F.3d 573, 589 (6th Cir.

⁴ Alternatively, Plaintiff may refer to the Fourteenth Amendment solely for its incorporation of the relevant provisions under the Eighth Amendment, *see Robinson v. California*, 370 U.S. 660, 667 (1962), as applied to the States. In that event, no further discussion of the Fourteenth Amendment claim is required.

2014) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998) (quoting *Rochin v. California*, 342 U.S. 165, 172–73 (1952))).

“Where a particular [a]mendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that [a]mendment, not the more generalized notion of “substantive due process,” must be the guide for analyzing these claims.’” *Albright v. Oliver*, 510 U.S. 266, 269 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 394 (1989) (holding that the Fourth Amendment, not substantive due process, provides the standard for analyzing claims involving unreasonable search or seizure of free citizens, and the Eighth Amendment provides the standard for such searches of prisoners), *overruled on other grounds by Saucier v. Katz*, 533 U.S. 194 (2001)). If such an amendment exists, the substantive due process claim is properly dismissed. *Heike v. Guevara*, 519 F. App’x 911, 923 (6th Cir. 2013).

In this case, the Eighth Amendment provides an explicit source of constitutional protection to Plaintiff concerning his deliberate indifference claim. *See Graham*, 490 U.S. at 394 (citing *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (rejecting a substantive due process claim where the Eighth Amendment supplies a textual source for prison-condition claims)); *Dodson v. Wilkinson*, 304 F. App’x 434, 438 (6th Cir. 2008) (concluding that because the Eighth Amendment supplies the explicit textual source of constitutional protection for claims governing a prisoner’s health and safety, the plaintiff’s substantive due process claim was subject to dismissal). Thus, the standard applicable to that source, the Eighth Amendment right to be free from cruel and unusual punishment, and not the more generalized notion of substantive due process, should be applied. Consequently, Plaintiff’s substantive due process claim will be dismissed.

Conclusion

Having conducted the review required by the Prison Litigation Reform Act, the Court determines that Plaintiff’s complaint will be dismissed for failure to state a claim, under 28 U.S.C.

§ 1915A(b), and 42 U.S.C. § 1997e(c). The Court must next decide whether an appeal of this action would be in good faith within the meaning of 28 U.S.C. § 1915(a)(3). *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997). Although the Court concludes that Plaintiff's claims are properly dismissed, the Court does not conclude that any issue Plaintiff might raise on appeal would be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). Accordingly, the Court does not certify that an appeal would not be taken in good faith. Should Plaintiff appeal this decision, the Court will assess the \$505.00 appellate filing fee pursuant to § 1915(b)(1), *see McGore*, 114 F.3d at 610–11, unless Plaintiff is barred from proceeding *in forma pauperis*, *e.g.*, by the “three-strikes” rule of § 1915(g). If he is barred, he will be required to pay the \$505.00 appellate filing fee in one lump sum.

This is a dismissal as described by 28 U.S.C. § 1915(g).

A judgment consistent with this opinion will be entered.

Dated: March 1, 2022

/s/ Jane M. Beckering

Jane M. Beckering
United States District Judge